A **DARSHAN SINGH KHAIRA v. MAJLIS PEGUAM MALAYSIA**

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
HARMINDAR SINGH DHALIWAL FCJ
B [CIVIL APPEAL NO: 02(f)-72-09-2019(W)]
13 AUGUST 2021

LEGAL PROFESSION: *Practice of law – Practicing as advocate and solicitor – Test for – Mere act of giving legal advice – Isolated acts of giving legal advice –*
C *'Unqualified person' giving legal advice for reward – Whether engaging in legal practice – Whether 'practicing law' – The Sanderson test – Legal Profession Act 1976, ss. 29, 32, 35, 36, 37 & 38*

The appellant advocate and solicitor, an undischarged bankrupt, had been
D struck off the Roll of Advocates and Solicitors by the respondent Majlis Peguam when he was found to have practiced law during his bankruptcy without a valid practicing certificate. The facts showed that the appellant had given legal advice to the complainant herein (a client of the legal firm M/s Darshan Singh & Co), essentially on the appeal procedure to the High Court. It was, however, the appellant's contention that merely advising the
E complainant did not amount to 'practicing law' under the Legal Profession Act 1976 ('LPA'), more so when the legal fee thereof was collected not by him but by M/s Darshan Singh and Co. The High Court judge, in dismissing the appellant's appeal against the decision of the respondent and its Disciplinary Board, however ruled that what the appellant did had offended
F s. 29(2) of the LPA (an undischarged bankrupt cannot practice law without the consent of the Bar Council), and further that, the appellant's act lay so near to or at the very centre of the practice of law that it amounted to practicing law. On appeal, the Court of Appeal, affirming the High Court, opined that whilst the mere giving of advice or isolated acts of giving advice
G could not amount to practicing law, the appellant was on the facts practicing law, as he was in actuality giving legal advice for reward. The appellant appealed further and upon obtaining leave posed the following question of law to the learned justices of the apex court, namely: whether the giving of advice to a client of a law firm amounts to practicing law.

H **Held (dismissing appeal; declining to answer question)**
Per Harmindar Singh Dhaliwal FCJ delivering the judgment of the court:

(1) The LPA does not provide any determinative test as to what amounts to practicing as an advocate and solicitor. Nonetheless, isolated acts of giving advice can constitute practicing law. Even a single or isolated act
I can amount to acting as an advocate and solicitor. The issue is not so much a single or isolated piece of advice but rather whether the

impugned act is what a lawyer usually does in carrying out his functions and duties as an advocate and solicitor. This accords with the *Sanderson* test as laid out in *Re Sanderson Ex parte Law Institute of Victoria.* (paras 17, 20 & 21)

(2) In drafting and preparing the documents needed for the complainant's appeal to the High Court, the appellant had provided a service which went beyond mechanical or clerical tasks and was of a kind required to be performed by a solicitor. The appellant was plainly doing something which is usually done by a solicitor and doing it in such a way as to justify the reasonable inference that he is a solicitor. It was also the appellant's intention that the complainant would act on his advice. Plainly, there exists a relationship of confidence and trust between the appellant and the complainant which is an essential part of legal practice. Hence, the appellant was involved in the practice of law and his conduct violated the LPA as he was a bankrupt who had not obtained the consent of the Bar Council to practice law. (paras 26, 29, 30 & 31)

(3) It is not an acceptable proposition of law to suggest that the giving of legal advice must be coupled with receiving fees or reward before it can be said that one is practicing law. The more reasonable proposition would be any payment or receipt of fees or reward is not a pre-requisite to a finding that a person has engaged in legal practice. However, if such fees or reward is received, then it is more likely that a person may be deemed to have been practicing law. (paras 33 & 34)

(4) The courts below were entitled to come to the findings on the core issues as they did subject to the observation that it would not make any difference if the appellant did not receive payment for the work done; giving legal advice for reward is not a prerequisite for a finding of practicing law. In any case, the services provided by the appellant was not without payment, as payment was indeed made by the complainant to M/s Darshan Singh & Co. (paras 32, 37 & 40)

(5) The punishment as imposed on the appellant by the respondent was justified and was not in any way disproportionate. The appellant was certainly guilty of serious misconduct when he continued to practice law when he knew he was disqualified from doing so. (para 38)

(6) On the question of law posed, it required this court to demarcate or define the nature of legal advice which would constitute 'practicing law'. Although we have endeavoured to set out the law in relation to the leave question, a lot depends upon the contextual facts and circumstances. We therefore decline to answer the question. (para 40)

Bahasa Melayu *Headnotes*

Perayu peguambela dan peguamcara, seorang bankrap, telah disingkirkan daripada Senarai Peguambela dan Peguamcara oleh responden Majlis Peguam kerana didapati beramal sebagai pengamal undang-undang dalam tempoh kebankrapannya tanpa suatu sijil amalan yang sah. Fakta menunjukkan bahawa perayu telah memberi nasihat guaman kepada pengadu di sini (seorang klien firma guaman M/s Darshan Singh & Co), secara asasnya berhubung dengan prosedur rayuan ke Mahkamah Tinggi. Perayu bagaimanapun berhujah bahawa memberi nasihat guaman semata-mata tidak menjadikan beliau seorang pengamal undang-undang bawah Akta Profesion Undang-Undang 1976 (APU), sementelah fee guaman untuk nasihat tersebut tidak dibayar kepadanya tetapi kepada M/s Darshan Singh & Co. Hakim Mahkamah Tinggi, dalam menolak rayuan perayu terhadap keputusan responden dan Lembaga Disiplinnya, berpendapat bahawa apa yang dilakukan perayu telah melanggari s. 29(2) APU (seorang bankrap tidak boleh beramal undang-undang tanpa kebenaran Majlis Peguam), dan selanjutnya bahawa tindakan perayu adalah hampir dengan atau merupakan inti kepada amalan undang-undang sehingga menjadikannya satu perbuatan beramal undang-undang. Di rayuan, Mahkamah Rayuan, dalam mengesahkan Mahkamah Tinggi, memutuskan bahawa sementara memberi nasihat semata-mata dan tindakan-tindakan memberi nasihat secara terasing bukan perbuatan beramal undang-undang, perayu telah beramal undang-undang berdasarkan fakta kerana memberi nasihat untuk mendapatkan bayaran. Perayu merayu selanjutnya dan setelah diberi kebenaran telah mengemukakan soalan undang-undang berikut kepada hakim-hakim mahkamah tertinggi yang bijaksana, iaitu: sama ada memberi nasihat kepada seorang klien sebuah firma undang-undang satu perbuatan beramal undang-undang.

Diputuskan (menolak rayuan; enggan menjawab soalan)
Oleh Harmindar Singh Dhaliwal HMP menyampaikan penghakiman mahkamah:

(1) APU tidak memperuntukkan sebarang ujian determinatif mengenai apa yang dimaksudkan dengan beramal sebagai seorang peguambela dan peguamcara. Namun, suatu tindakan yang terasing boleh menjadi perbuatan beramal undang-undang. Suatu tindakan tunggal masih mampu menjadi perbuatan beramal sebagai seorang peguambela dan peguamcara. Isunya bukan mengenai perbuatan atau nasihat tunggal atau terasing tetapi lebih kepada sama ada perbuatan yang dipersoal itu perbuatan yang selalunya dibuat oleh seorang peguam dalam melaksanakan tugas dan tanggungjawabnya sebagai peguam. Ini selaras dengan ujian *Sanderson* seperti yang dirungkai di dalam *Re Sanderson Ex parte Law Institute of Victoria.*

(2) Perayu, dalam menyediakan dokumen-dokumen yang diperlukan pengadu untuk rayuan ke Mahkamah Tinggi, tidak hanya memberi perkhidmatan mekanikal atau perkeranian tetapi perkhidmatan yang hanya diberi oleh seorang peguamcara. Jelasnya, perayu melakukan sesuatu yang biasanya dibuat oleh seorang peguamcara dan melakukannya dengan cara yang menimbulkan inferens munasabah bahawa dia adalah seorang peguamcara. Juga menjadi tujuan perayu agar nasihatnya itu diikuti oleh pengadu. Maka wujud suatu hubungan saling mempercayai di antara perayu dan pengadu yang merupakan unsur penting amalan undang-undang. Oleh itu, perayu terlibat dengan amalan undang-undang dan kelakuannya telah melanggar APU disebabkan perayu adalah seorang bankrap yang tidak mendapat kebenaran Majlis Peguam untuk beramal undang-undang.

(3) Ia bukanlah suatu proposisi undang-undang yang boleh diterima bahawa pemberian nasihat guaman mesti diikuti dengan penerimaan atau bayaran fee sebelum boleh menjadi satu perbuatan beramal undang-undang. Proposisi yang lebih munasabah adalah bahawa pembayaran atau penerimaan fee bukanlah syarat bagi dapatan bahawa seseorang itu telah beramal undang-undang. Namun, jika fi atau bayaran dibuat, ia memungkinkan seseorang itu dianggap sebagai telah beramal undang-undang.

(4) Dapatan mahkamah-mahkamah di bawah mengenai isu-isu pokok adalah wajar, tertakluk kepada pandangan bahawa tidak ada apa-apa perbezaan jikapun perayu tidak menerima bayaran bagi kerja yang dibuatnya; memberi nasihat guaman untuk bayaran bukan syarat kepada dapatan wujudnya perbuatan beramal undang-undang. Apapun, perkhidmatan yang diberi oleh perayu di sini bukanlah tanpa bayaran oleh kerana bayaran telah dibayar oleh pengadu kepada M/s Darshan Singh & Co.

(5) Hukuman yang dijatuhkan oleh responden atas perayu adalah wajar dan bukan sesuatu yang tidak berpatutuan. Perayu jelas telah melakukan salah laku yang serius apabila terus beramal sebagai pengamal undang-undang walaupun sedar bahawa beliau tidak mempunyai kelayakan untuk berbuat demikian.

(6) Mengenai soalan yang dikemukakan, ia menuntut mahkamah ini untuk mentakrif atau meletak sempadan kepada sifat-sifat nasihat guaman yang boleh menjadikan seseorang itu sebagai 'pengamal undang-undang'. Walaupun kami telah cuba untuk menggariskan undang-undang mengenai soalan kebenaran ini, banyak yang bergantung kepada konteks fakta dan hal keadaan sesuatu kes. Kami dengan itu tidak menjawab soalan tersebut.

Case(s) referred to:
Australian Competition & Consumer Commission v. Murray [2002] FCA 1252 ***(refd)***
Chan Chow Wang v. Malaysian Bar [1986] 1 LNS 94 HC ***(refd)***
Charan Jit Singh Santokh Singh v. Majlis Peguam Malaysia & Anor [2013] 1 LNS 78 HC ***(refd)***
Cornall v. Nagle [1995] 2 VR 188 ***(refd)***
Darshan Singh Khaira v. Zulkefli Hashim [2020] 1 LNS 260 CA ***(refd)***
Legal Practice Board v. Adams [2001] WASC 78 ***(refd)***
Legal Services Commissioner v. Walter [2011] QSC 132 ***(refd)***
New York County Lawyers Association v. Dacey 28 AD 2d 161 (1967) ***(refd)***
Re Sanderson; Ex parte Law Institute of Victoria [1927] VLR 394 ***(refd)***
Teoh Hooi Leong v. Bar Council [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451 SC ***(refd)***
Thavananthan Balasubramaniam v. Majlis Peguam Malaysia [2009] 6 CLJ 217 FC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 29(2)(b), 35, 36, 37, 38(1)(m), 107

For the appellant - In person
For the respondent - Oh Teik Keng; M/s Oh Teik Keng & Partners

[Editor's note: For the Court of Appeal judgment, please see Darshan Singh Khaira v. Zulkefli Hashim [2020] 1 LNS 260 (affirmed).]

Reported by Wan Sharif Ahmad

JUDGMENT

Harmindar Singh Dhaliwal FCJ:

[1] This appeal concerns an issue of some importance to the legal profession. The question for our consideration is simply this: under what circumstances can it be said that a person is practising law. Can someone who has given some legal advice informally be said to have practised law? Can an isolated act of giving advice constitute practising law or must it require a systematic, regular and continuous act? Or does it require something more in the form of a solicitor-client status requiring a relationship of trust and confidence?

[2] The appellant, Darshan Singh Khaira, was a practising lawyer for many years. However, by a decision of the disciplinary board (the "DB") of the Majlis Peguam Malaysia dated 14 April 2016, he was struck off the Roll of Advocates and Solicitors of the High Court of Malaya. The basis for the said order was that the appellant was practising law without a practising certificate as he was a bankrupt.

[3] The appellant then filed an originating summons in the High Court at Kuala Lumpur to set aside the said order of the DB of the Majlis Peguam Malaysia. The High Court dismissed his application. He then filed an appeal

to the Court of Appeal. He failed again. He was, however, successful in obtaining leave of this court to file an appeal on a single question of law as follows:

> Whether the giving of advice to a client of a law firm amounts to practising as a lawyer.

The Background

[4] In order to appreciate how the appellant came to the predicament of being struck off the Roll, it is necessary to set out the relevant facts. It transpired that the appellant had assisted the complainant, Zulkefli bin Hashim, in a traffic case in the Magistrate's Court in Georgetown and later in proceedings before the High Court and Court of Appeal. Although the complainant had represented himself in these proceedings, he had engaged the appellant to prepare the legal documentation and had sought legal advice from him. When the Court of Appeal had struck out his appeal on a procedural ground in that prior leave to appeal had not been obtained, the complainant lodged a complaint with the Majlis Peguam Malaysia.

[5] The complaint was heard by the Disciplinary Committee ("DC") on 27 January 2015 and 15 January 2016. At the end of the hearing, the DC made the finding that the appellant had committed a serious misconduct by providing legal advice to the complainant at the relevant time between 22 August 2007 to 15 January 2009 when he was an undischarged bankrupt and did not hold a valid practising certificate. The DC recommended that the appellant be struck off the Roll of Advocates and Solicitors of the High Court of Malaya. This recommendation was accepted by the DB and by an order dated 14 April 2016, the appellant was duly struck off the Roll of Advocates and Solicitors of the High Court of Malaya.

Proceedings In The Courts Below

[6] At the High Court, the appellant raised various grounds to set aside the order of the DB of the Majlis Peguam Malaysia. The only ground which was relevant to the appeal before us was that the charge of misconduct was not proved against the appellant as he had never practised law during the bankruptcy order. The appellant took the position that any layman can give advice and assist a litigant. Further, no fees were collected by the appellant himself as all fees and disbursements were paid to the firm of Messrs Darshan Singh & Co for prior work done.

[7] In this respect, however, the High Court particularly noted the findings of fact made by the DC:

(i) that the appellant had advised the complainant on the appeal procedure from the Magistrate's Court to the High Court and from the High Court to the Court of Appeal; and

(ii) that the appellant had procured legal fees and disbursement from the complainant in his professional capacity as a practising advocate and solicitor, as can be seen from the receipts dated 6 August 2007, 18 August 2007 and 14 February 2008.

[8] The High Court went on to hold (at para. 24):

> [24] In the present case, when the appellant was adjudged a bankrupt on 22.8.2007, his practicing certificate was automatically suspended and he cannot practice without the consent of the Bar Council. Therefore, based on the evidence before the DC and the admission of the appellant himself that he had advised the Complainant on the appeal process when he did not hold a valid practicing certificate, the appellant had acted against section 29(2)(a) of the LPA 1976.

[9] Now, the appellant also argued that as a lay person, there was nothing wrong for him to give legal advice and also that merely advising a party is not practicing law. This contention by the appellant was, however, not accepted by the High Court. Relying on the Australian case of *Legal Services Commissioner v. Walter* [2011] QSC 132 ("*Walter*"), the High Court held that based on the evidence, all the acts of the appellant can be said to lie at or near the very centre of the practice of law, and hence amount to practising law. Added to that was the fact that the appellant was paid for the legal services that he had rendered.

[10] On appeal to the Court of Appeal, the appellant raised, among others, the same issue in that the mere giving of legal advice cannot amount to practising law. The Court of Appeal, however, relied on *Walter*'s case, and held that the appellant was giving legal advice for reward although he himself did not receive the fees. The following is how the court put it:

> [18] As found by the learned High Court Judge, the appellant had admitted that the "yuran guaman dated 18.8.2007 and 6.8.2007" were payment for the drafting of the written submission in the Magistrates' Court, while the receipt dated 4.3.2011 was for the outstanding fees for the High Court matter. This shows that the appellant was giving legal advice for reward and this can be said "to lie at or near the very centre of the practice of law" and hence amount to practising law. Although we agree that mere giving of advice would not tantamount to practising law, but the giving of advice for fees or reward would definitely bring to that conclusion.

[11] Needless to add, the appellant again failed on this issue and his appeal was accordingly dismissed.

The Instant Appeal

[12] Seemingly undeterred, the appellant successfully obtained leave to appeal to this court. The issue for our determination, following from the single leave question, was whether the giving of advice to a client of a law firm amounts to practising as a lawyer. Allied to this issue, as raised by the

respondent, is also the question of whether payment is necessary before the giving of advice becomes legal practice. If that is indeed the case, an issue which must follow is whether payment must be received by the person giving the assistance, before that assistance becomes legal advice.

[13] Now, it must be noted at the outset that an undischarged bankrupt cannot practice law without the consent of the Bar Council. This is provided under s. 29(2)(b) of the Legal Profession Act 1976 ("LPA 1976") which reads:

> **Advocate and solicitor to make declaration yearly**
>
> 29 (1) …
>
> (2) Subject to subsection (3), every practising certificate shall be signed by the Registrar and shall be valid from the date of issue to the end of the year:
>
> Provided that:
>
> (a) …
>
> (b) where an advocate and solicitor is adjudicated a bankrupt or a receiving order is made against him, the practising certificate, if any, of that advocate and solicitor shall be suspended forthwith, until the consent of the Bar Council to reinstate it is obtained.

[14] It must follow that when the appellant was adjudged a bankrupt on 22 August 2007, his practising certificate was automatically suspended and he could not practice without the consent of the Bar Council. The evidence before the DC, however, disclosed that the appellant had given legal advice to the complainant when he did not have a valid practising certificate. He had also procured legal fees and disbursements from the complainant as evidenced by the receipts issued. By his own admissions to the DB, he would have *ex hypothesi* acted in breach of s. 29(2)(b) of the LPA 1976.

[15] As he had done before the courts below, the appellant maintained before us that as a lay person, there was nothing wrong for him to give legal advice. Any lay person could give legal advice and assist a litigant. In short, he argued that merely advising a party is not practicing law. He also claimed that he did not collect the legal fees for himself as they were paid to the legal firm of M/s Darshan Singh & Co for work done by him.

[16] In order to contemplate upon these assertions by the appellant, it is pertinent to observe at the outset that there is no inherent right to practice law. It is only an advocate and solicitor who is given certain privileges which attach to his profession under Part IV of the LPA 1976. So, for example, under s. 35 of the LPA 1976, an advocate and solicitor has the exclusive right to appear and plead in all courts of justice. The only condition is that he/she must have his/her name on the Roll and have a valid practising certificate. Any person who is not so qualified is deemed to be an

A "unauthorised person" (see s. 36 of the LPA 1976). So, an unauthorised person who acts as an advocate and solicitor commits an offence (see s. 37 of the LPA 1976). Section 38 of the LPA 1976, however, provides some exceptions to acting as an advocate and solicitor, for example, a full-time employee of the advocate and solicitor can draw up and prepare documents
B (see s. 38(1)(m) of the LPA 1976).

[17] Although the LPA 1976 is instructive as to the types of conduct which are within the exclusive domain of advocates and solicitors, the statute does not provide any determinative test as to what amounts to practising as an advocate and solicitor in all other cases. We should also add, lest it is carried
C too far, that although the LPA 1976 itself describes these functions as the privilege of advocates and solicitors, implicit within the provisions is the need to protect the public against persons who, although being without the necessary qualifications and competence of an advocate and solicitor, may purport to provide such services which may clearly be outside their
D competence to the detriment of unsuspecting members of the public. The penalties that will be visited upon such "unauthorised persons" is testament of the policy reasons behind such protection. After all, an advocate and solicitor has the necessary educational qualifications and training and is required, as a prerequisite, to be of good character. Importantly as well, an
E advocate and solicitor will be subject to discipline if he/she falls short of the prescribed standards under the law.

[18] Be that as it may, the present appeal presents quite a different state of circumstances. It is not about a lay person holding himself out to be an advocate and solicitor. The appellant here has become an unqualified person
F by virtue of being suspended from practice. He may have been fully competent in going about his profession as an advocate and solicitor but he is prohibited from doing so by law when he became a bankrupt.

[19] The appellant nevertheless contends that isolated acts of giving advice can never constitute practising law. Practising law, he says, requires a
G systematic, regular and continuous act. He submitted that isolated acts of advice do not require a practising certificate and cannot amount to professional misconduct. He is saying, in effect, as he is probably compelled to do, that he was not engaging in legal practice when he assisted the complainant.

H **[20]** With respect, we do not agree. In our view, even a single or isolated act can amount to acting as an advocate and solicitor. It is not so much a single or isolated piece of advice but rather whether the impugned act or acts is what a lawyer usually does in carrying out his functions and duties as an advocate and solicitor.

I

[21] There are a dearth of precedents in this area of the law in Malaysia. The Australian courts, however, have had the opportunity to deal with such matters in some cases. In *Cornall v. Nagle* [1995] 2 VR 188, JD Phillips J of the Supreme Court of Victoria endorsed the *Sanderson* test laid down in *Re Sanderson. Ex parte Law Institute of Victoria* [1927] VLR 394, in which Cussen J set out the following practical test of whether a person has engaged in legal practice:

> If a person does a thing usually done by a solicitor, and does it in such a way as to lead to the reasonable inference that he is a solicitor – if he combines professing to be a solicitor with action usually taken by a solicitor – I think he then does act as a solicitor.

[22] The three ways in which a person could be said to be practising as a solicitor was summarised by the court as follows:

> Based upon the foregoing, I conclude that a person who is neither admitted to practise nor enrolled as a barrister and solicitor may "act or practise as a solicitor" in any of the following ways:
>
> (1) by doing something which, though not required to be done exclusively by a solicitor, is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor. This is the test in *Sanderson*.
>
> (2) by doing something that is positively proscribed by the Act or by Rules of Court unless done by a duly qualified legal practitioner. Examples of such prohibitions in a statute are s. 93 and s. 111 of the LPPA. (Legal Profession Practice Act 1958).
>
> (3) by doing something which, in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law. For present purposes, it is unnecessary to go beyond the example of the giving of legal advice as part of a course of conduct and for reward.

[23] In conclusion, JD Phillips J observed:

> In my opinion, the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very centre of the practice of the law, and hence of the notion of acting or practising as a solicitor, which is itself central to s 90. If the public is to be adequately protected from those lacking relevant qualifications, then, in the context of a regulated legal profession, the giving of legal advice professionally is, I think, to be regarded as exclusively the province of those properly trained in the law and having the necessary expertise. It is thus something required to be undertaken only by the legally qualified, and not by those not properly qualified.

[24] In *Walter*'s case (*supra*), a case relied upon by the courts below, the Supreme Court of Queensland had to contend with an application for an injunction to restrain the defendant, who was not an Australian legal practitioner, from engaging in legal practice in the State of Queensland. The court had to ascertain whether the impugned conduct of the defendant amounted to a person carrying on or exercising the profession of law, and had thereby practised law. In allowing the application and finding that the defendant had practised law, Daubney J alluded to each of the following matters which can be said to lie near the very centre of the practice of litigation law:

(a) advising parties to litigation in respect of matters of law and procedure;

(b) assisting parties to litigation in the preparation of cases for litigation;

(c) drafting court documents on behalf of parties to litigation;

(d) drafting legal correspondence on behalf of parties to litigation; and

(e) purporting to act as a party's agent in at least one piece of litigation.

[25] On our part, we find no reason to think that the matters listed above are not matters which lie at the heart of the practice of law. So, in the present case, although being an "unauthorised person" as he was suspended from practice, the appellant not only actively advised the complainant on the procedures applicable in the Court of Appeal but also prepared the documents for the appellant to file in the Court of Appeal. The said advice and documents were directly relevant to the complainant's rights and were tailored to meet the particular needs of the complainant (see *Australian Competition & Consumer Commission v. Murray* [2002] FCA 1252).

[26] In drafting and preparing the documents needed for the complainant's appeal, the appellant provided a service which went beyond mechanical or clerical tasks and was of a kind required to be performed by a solicitor as the knowledge of the layman in these matters would be wholly inadequate. In *Legal Practice Board v. Adams* [2001] WASC 78, a case before the Supreme Court of Western Australia, the defendant faced a charge of contempt for acting as a solicitor when he was not a duly certified legal practitioner. He had drawn up various documents relating to legal practice. His defence was that he was acting more in a clerical capacity than as a solicitor.

[27] In coming to his decision, Hasluck J accepted that the practice of law "includes the giving of legal advice and counsel to others as to their rights and obligations under the law and the preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court".

[28] In finding the defendant guilty of contempt, Hasluck J observed: A

> If the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the person giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving B of such advice and the performance of such services by one for another as a course of conduct constitutes the practice of the law … [W]here an instrument is to be shaped from a mass of facts and conditions, the legal effect of which must be carefully determined by a mind trained in the existing laws in order to ensure a specific result and to guard against others, more than the knowledge of the layman is required. A charge for C such service brings it definitely within the term 'practice of the law'.

[29] In the circumstances, we did not think, as the appellant had asserted, that he was merely giving legal advice and assisting the litigant as any lay person would. By actively advising the complainant on his appeal and preparing the necessary documents, the appellant was plainly doing D something which is usually done by a solicitor and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor. The legal advice and the documents to be prepared required the expertise of a legally trained mind. Although legal clerks also prepare such documents, they do so with the supervision and approval of the solicitor. E

[30] Put simply, the appellant was doing, as the evidence disclosed, what a lawyer does when a client comes for advice and it was intended for the complainant to act on the legal advice provided. In our view, there existed quite plainly a relationship of confidence and trust between the appellant and the complainant which is an essential of legal practice (see *New York County Lawyers Association v. Dacey* 28 AD 2d 161 (1967)). It was not a case where F some legal advice was given casually or informally and importantly, lacking the necessary setting and status of a solicitor dealing with a client.

[31] For all the preceding reasons, we were in agreement that the courts below were justified in concluding that the appellant was involved in the G practice of law. His conduct was in violation of the LPA 1976 as he was a bankrupt who had not obtained the consent of the Bar Council to practice law.

[32] Now, that should be sufficient to dispose of this appeal. However, H there is still outstanding an issue which was raised by the appellant which appeared to be accepted by the Court of Appeal. The appellant claimed that he did not collect the legal fees for himself as they were paid to the legal firm of M/s Darshan Singh & Co for work done. In other words, the non-collection of fees for himself, it was submitted, was decisive in establishing in his favour the issue of whether he was practising law. Much of the I confusion arose from the following conclusion by the Court of Appeal, as was set out earlier, and as reported in [2020] 1 LNS 260; [2020] MLJU 339 at para. [18]:

A … This shows that the appellant was giving legal advice for reward and this can be said "to lie at or near the very centre of the practice of law" and hence amount to practising law. Although we agree that mere giving of advice would not tantamount to practising law, but the giving of advice for fees or reward would definitely bring to that conclusion.

B **[33]** This passage suggests as asserted by learned counsel by the respondent that the mere giving of advice without reward cannot amount to practising law. In other words, the giving of legal advice must be coupled with receiving fees or reward before it can be said that one is practising law.

[34] We must say at once that if that was what was intended by that C passage, it was most unfortunate and is certainly not an acceptable proposition of law. To be fair, some of the confusion may have arisen because of the reference to "reward" in some of the precedents referred to by the Court of Appeal which we will deal with shortly. In our judgment, the more reasonable proposition is that any payment or receipt of fees or D reward is not a pre-requisite to a finding that a person has engaged in legal practice. However, if such fees or reward is received, then it is more likely that a person may be deemed to have been practising law.

[35] If this was not the case, it would turn out to be quite a remarkable circumstance for a lawyer following from his suspension as an advocate and E solicitor to continue to advise clients and even appear in court on their behalf with the excuse that he cannot be said to be practising law because he is acting *pro bono* or without reward. In our respectful view, any such solicitor, if he/she had acted as such, would be in breach of the LPA 1967.

[36] Now, the Court of Appeal was very much influenced by a passage F purportedly in *Walter*'s case (*supra*), where it was observed that the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very centre of the practice of law. With respect, this passage ought to be attributed to JD Phillips J's pronouncement in *Cornall v. Nagle* (*supra*). Be that as it may, Daubney J in *Walter*'s case G clarified the position as follows:

> [21] In short, the fact that a person is engaged in the business of providing legal services is indicative of that person practising law, but a person may be practising law without being in business. It is clear, for example, that an Australian legal practitioner can exercise the profession of law for H clients without any entitlement to or expectation of reward or remuneration from those clients. But an Australian legal practitioner who habitually acts *pro bono* for needy clients can hardly be said to be not engaged in legal practice because he or she provides professional legal services without reward from those clients.

I **[37]** Returning to the instant appeal, and in view of what we have observed, it must follow that it would not make any difference if the appellant did not receive payment for the work done. As we had pointed out, giving legal

advice for reward is not a pre-requisite for a finding of practising law. In any case, as it turned out, the services provided by the appellant were not without payment. Payment was indeed made to the firm of M/s Darshan Singh & Co by the complainant. So, for the reasons we have mentioned, the appellant's arguments in this context were without merit.

[38] Finally, we come to the issue of whether the punishment of being struck off the Roll was disproportionate to the conduct of the appellant. The appellant claimed it was harsh and totally disproportionate. He had not raised this issue in the courts below and we did not therefore have the benefit of a prior consideration of this issue before us. At any rate, we did not consider the punishment to be disproportionate. The appellant was certainly guilty of serious misconduct when he continued to practice law when he knew he was disqualified from doing so. So, we think the punishment was justified.

[39] Be that as it may, it is pertinent to observe that the punishment of being struck off the Roll may not mean the end of a career as an advocate and solicitor. An advocate and solicitor who has been struck off can apply for reinstatement under s. 107 of the LPA 1967. He/she will have to satisfy the court that it would be fair and reasonable to restore the said advocate and solicitor to the Roll based on the criteria settled in decided cases (see *Charan Jit Singh Santokh Singh v. Majlis Peguam Malaysia & Anor* [2013] 1 LNS 78; [2013] 9 MLJ 400; *Teoh Hooi Leong v. Bar Council* [1991] 2 CLJ 1117; [1991] 1 CLJ (Rep) 451; [1991] 2 MLJ 190; *Chan Chow Wang v. Malaysian Bar* [1986] 1 LNS 94; [1986] 2 MLJ 159; and *Thavananthan Balasubramaniam v. Majlis Peguam Malaysia* [2009] 6 CLJ 217; [2010] 3 MLJ 316).

Conclusion

[40] In conclusion, and for the reasons mentioned, we did not find any merit in the issues raised by the appellant. The courts below were entitled to come to the findings on the core issues as they did subject to our observations as expressed in paras. [32] to [37] above. On the question of law posed before us, we considered that it would require this court to demarcate or define the nature of legal advice which would constitute "practising law". Although we have endeavoured to set out the law in relation to the leave question but, as the cases show, a lot depends upon the contextual facts and circumstances. We therefore decline to answer the question.

[41] In the circumstances, the appeal is dismissed with no order as to costs. The orders made by the courts below are hereby affirmed.